Supreme Court, U.S.
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Nos. 85-1377, 85-1378, 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT UNITED STATES SENATE

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QUESTION PRESENTED

Whether it violates the principle of separation of powers for the Comptroller General, an independent officer of the United States appointed by the President for a statutory term of years by and with the advice and consent of the Senate, to perform the administrative tasks assigned to him by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, because a provision (now 31 U.S.C. 703(e)) of the Budget and Accounting Act of 1921 establishes a procedure for his removal for cause by an enactment in conformity with the Presentation Clause, particularly when that provision has never been used or tested and could be severed if necessary.

PARTIES IN THE DISTRICT COURT

The plaintiffs in Civil Action No. 85-3945, in addition to Representative Mike Synar, were Representatives Gary L. Ackerman, Albert G. Bustamante, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. LaFalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, and James A. Trafficant, Jr. The plaintiff in Civil Action No. 85-4106 was the National Treasury Employees Union.

The United States was the defendant, and the Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General were intervenors, in both actions. The individual House intervenors were Speaker Thomas P. O'Neill, Jr., Majority Leader Jim Wright, Minority Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Minority Whip Trent Lott.

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OPINION BELOW

The opinion of the district court, J.A. 27-80, is not yet reported. The order of the district court granting declaratory relief is reprinted at J.A. 81-82.

JURISDICTION

The district court had jurisdiction under section 274(a)(1) and (2) of the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Deficit Control Act" or the "Act"), Pub. L. No. 99-177, 99 Stat. 1037, 1098. J.A. 162-63. This Court has jurisdiction under 28 U.S.C. 1252 and section 274(b) of the Act, 99 Stat. 1098-99. J.A. 163.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Appointments Clause, article II, section 2, clause 2 of the Constitution. J.A. 92.

2. 31 U.S.C. 703 (a)(1) and (e), J.A. 101-02, which codify sections 302 and 303 of the Budget and Accounting Act of 1921, Pub. L. No. 13, ch. 18, 42 Stat. 20, 23-24. J.A. 92, 94.

3. Part C of the Deficit Control Act, 99 Stat. 1063-93, 2 U.S.C. 901-907. J.A. 109-61.

STATEMENT OF THE CASE

Upon the President's approval of the Deficit Control Act on December 12, 1985, its key provisions were immediately applicable to the present fiscal year, 1986, which had begun on October 1, 1985. Act, § 275(a)(1); J.A. 167. Later on December 12 Representative Synar filed an action challenging the Act's constitutionality; an amended complaint on December 19 added other House member plaintiffs. J.A. 9. Administrative implementation of the Act for this fiscal year culminated in the President's February 1, 1986 sequestration order. The litigation in the district court resulted in turn on February 7, 1986, in a declaratory order that the President's order was without legal force and effect. We first will describe the actions to implement the Act this fiscal year.

A. THE FEBRUARY 1, 1986 PRESIDENTIAL SEQUESTRATION ORDER

To achieve a balanced budget by fiscal 1991, the Act establishes a series of declining deficit ceilings. Act, § 201(a); J.A. 104. For fiscal 1987, which begins on October 1, 1986, through fiscal 1991, the Act establishes these ceilings prior to the President's annual budget message and

the Congress' consideration of appropriations bills. The Congress enacted parts A and B of the Act, 99 Stat. 1039–63, to facilitate adherence to these deficit ceilings through the regular budget process. The administrative deficit reduction mechanism in part C of the Act, J.A. 109–61, is a standby mechanism for fiscal years 1987–91 which will be used only if the amended budget process fails to adhere to the maximum deficit limits. Because Congress enacted the maximum deficit amount for fiscal 1986, $171.9 billion, after this year's budget had been substantially determined, it knew that the deficit reduction mechanism would not be a standby procedure for this fiscal year, but would be used. To avoid disruption of federal activities in the middle of the fiscal year, the Act fixes an $11.7 billion ceiling upon this year's required deficit reduction. Act, § 251(a)(3)(A)(ii), (b)(1); J.A. 110, 116. This ceiling applies if the estimated fiscal 1986 deficit reaches $191.9 billion. *See* 51 Fed. Reg. 1924 n.2.

On January 15 the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") submitted a joint report to the Comptroller General estimating the excess budget deficit for this fiscal year. Act, § 251(a); J.A. 109. Generally assuming "the continuation of current law in the case of revenues and spending authority," Act, § 251(a)(6)(A); J.A. 115, the Directors estimated the budgetary consequences of those assumptions on the basis of economic projections as of January 10.[1] The OMB Director estimated a $220.1 billion deficit for this year; the CBO Director estimated a $220.9 billion deficit. Because these estimates exceeded $191.9 billion, the Directors reported the allocation of $11.7 billion of reduced expenditures. 51 Fed. Reg. 1923–24.

The Directors divided the required deficit reduction equally between defense and nondefense programs, Act, § 251(a)(3)(B); J.A. 110; 51 Fed. Reg. 1929–30, and calculat-

[1] Act, § 251(a); J.A. 109. For fiscal year 1987, the Directors must estimate revenues and outlays as of August 15 and report on August 20, 1986, to the Comptroller General. *Id.*

ed the savings from eliminating designated automatic spending increases.[2] They attributed to both the defense and the nondefense sides of the budget one-half of the savings from elimination of indexed increases in retirement and disability programs, and attributed to the nondefense side smaller savings from elimination of other indexed increases. Act, § 251(a)(3)(D-F); J.A. 111-12; 51 Fed. Reg. 1929-30.

After accounting for the elimination of automatic spending increases, the Directors ascertained the amount by which budgetary authority in the remaining accounts must be reduced. First, they identified the accounts which are statutorily exempt from sequestration.[3] They also complied with the President's exemption of military personnel accounts.[4] The Directors next calculated the reductions from prescribed exceptions, limitations, and special rules for limited reductions of expenditures in specified nondefense programs.[5] After subtracting the nonde-

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[2] The Act eliminates all designated automatic spending increases, Act, § 257(1); J.A. 159, unless the savings exceed one-half of the total sequestration. Act, §251(a)(3)(C); J.A. 111. Elimination of all designated automatic spending increases this year will save slightly more than $1,038 million. Because this sum does not exceed one-half of this year's required $11.7 billion reduction, the Directors reported the need to cancel all designated automatic spending increases. 51 Fed. Reg. 1932-33.

[3] Exempt accounts include social security benefits, food stamps, aid to families with dependent children, child nutrition, other low-income programs, certain veterans' programs, interest on the national debt, and compensation to the President and Article III judges. Act, § 255; J.A. 143-48.

[4] 51 Fed. Reg. 2085-87. The Director of OMB had notified the Comptroller General and the Congress on January 10 that the President would exempt from sequestration most fiscal year 1986 military personnel appropriations. The President used his authority under the Act to exempt $63.1 billion, or 93 percent, of the fiscal 1986 appropriations for those accounts. Act, § 252(a)(2)(B); J.A. 126; 51 Fed. Reg. 1926.

[5] 51 Fed. Reg. 1931-36. The Act limits reductions in medicare and certain other health programs to one percent in fiscal year 1986 and two percent in subsequent years. Other special rules govern the guaranteed student loan, child support enforcement, and foster care and adoption assistance programs. Act, § 256; J.A. 148-59.

fense savings from these special rules, the Directors determined the amount of defense and nondefense budgetary resources which are subject to "uniform percentage" reduction. Act, § 251(a)(3)(F)(iv)(I), (d)(1); J.A. 113, 119. Averaging their calculations of budgetary resources subject to uniform reductions, Act, § 251(a)(5); J.A. 115, the Directors concluded that $109.3 billion in defense programs and $114.8 billion in nondefense programs are subject to uniform reduction this year. They divided $5,353 million, the amount remaining after deducting automatic spending increases attributed to defense, by the defense total, and $4,912 million, the amount remaining after deducting automatic spending increases attributed to nondefense and the savings from programs subject to special rules, by the nondefense total. These calculations produced a required uniform percentage reduction of 4.9 percent for defense programs and 4.3 percent for nondefense programs. 51 Fed. Reg. 1930–31.

The Directors applied the percentage reductions to defense and nondefense accounts. *Id.*, 1942–2336. They also applied the uniform percentage reduction to programs, projects, and activities within defense accounts, Act, § 251(a)(2); J.A. 109–10, adhering to the President's decision to shield from reduction certain defense programs such as the Strategic Defense Initiative. Act, § 252(a)(2)(C)(i); J.A. 127; 51 Fed. Reg. 2223. The Directors reported that they "were able to agree on the conceptual application of P.L. 99–177 to all budget accounts except one," *id.*, 1919, and submitted to the Comptroller General their legal question about the Act's application to the payment to the Washington Metropolitan Area Transit Authority for interest on its bonds, *id.*, 1940.

The Comptroller General submitted his Report to the President and the Congress ("C.G. Rep.") on January 21, 1986.[6] He appraised the accuracy of OMB's and CBO's

[6] Act, § 251(b), (e); J.A. 116, 123; 51 Fed. Reg. 2813. In future fiscal years the Comptroller General will report to the President on August 25. Act, § 251(b)(1); J.A. 116–17.

Continued

economic forecasting, comparing their projections with those of leading private forecasters, C.G. Rep. at 35–46, and concluded: "[B]oth the OMB and CBO assumptions were within a reasonable range for fiscal year 1986. No alternative assumptions which we might adopt would result in a deficit of less than $191.9 billion, and any deficit exceeding this amount requires sequestering the maximum amount of $11.7 billion for fiscal year 1986." *Id.* at 2. The Comptroller General's principal change in the OMB–CBO report was the addition of $6.3 billion to the sequesterable defense program base. Neither OMB nor CBO had included prior-year unobligated balances in certain Procurement and Research, Development, Test, and Evaluation accounts, but the Comptroller General found no legal authority for exempting these balances from sequestration. *Id.* at 6. He also made several legally required adjustments in the sequesterable bases of several nondefense accounts, *id.* at 19–34, and addressed the legal issue left unresolved by the Directors about the Washington Metropolitan Area Transit Authority. The principal and interest of these bonds are guaranteed by the United States, and the Comptroller General decided that the appropriation for interest payments is not subject to sequestration, because it is an obligated balance within the meaning of the Act. *Id.* at 33.

On February 1 the President issued a sequestration order for fiscal year 1986 which cohered with the report of the Comptroller General in all respects. Act, § 252(a)(1), (3); J.A. 124, 128. The order became effective on March 1. S. Doc. No. 24, 99th Cong., 2d Sess. ix-xii (1986). The Act directs the President to apply the required reduction to

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The district court granted motions after the January 10 hearing to supplement the record with the reports of the OMB-CBO Directors and the Comptroller General. J.A. 4. These lengthy public documents are not reprinted in the Joint Appendix, but copies have been lodged with the Court. The court also granted a motion to supplement the record with the President's sequestration order. J.A. 5. This order has been reprinted together with incorporated department and agency reports in a Senate document, S. Doc. No. 24, 99th Cong., 2d Sess. (1986), which has also been lodged with the Court.

programs, projects, and activities within nondefense accounts, and the President's order incorporated reports from the executive, legislative, and judicial branches applying the reduction to their programs, projects, and activities. *Id.* at xii, 1-1119. The President may accompany a sequestration order with a message to the Congress proposing alternative ways to reduce the deficit, Act, § 252(c); J.A. 134, but he did not recommend any alternatives. S. Doc. No. 24, *supra*, at ix.

B. THE DECISION OF THE DISTRICT COURT

The three-judge district court consolidated the House members' action with an action, J.A. 13, by the National Treasury Employees Union. The plaintiffs contended that Congress unconstitutionally delegated its legislative power when it created an administrative mechanism to reduce the annual deficit. They also contended that the Comptroller General's and CBO Director's responsibilities under the Act violate the separation of powers. The United States, the defendant in the district court, claimed that the Act abridges the separation of powers by conferring administrative authority on the Comptroller General. The Senate, the House, and the Comptroller General intervened to defend the Act.[7] The court heard argument on January 10 and issued its decision on February 7, 1986.

After finding that the plaintiffs have standing, J.A. 32-38, the district court dismissed their contention that the Act unconstitutionally delegates the appropriations power to administrative officials. It held that the appropriations power is not functionally distinguishable from other powers whose delegation has been sustained, particularly noting the delegation of taxing power upheld in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). J.A. 43-44. Neither, the court held, does the Act permit administrators to nullify or to override laws. In-

[7] Each House has the right to intervene to defend the Act's constitutionality. Act, § 274(a)(4); J.A. 163. *See* S. Res. 282, 99th Cong., 1st Sess.; 131 Cong. Rec. S18099 (Dec. 19, 1985) (directing intervention).

stead, the Act is a form of "contingent legislation" in which the "Congress has stipulated that the full effectiveness of all appropriations legislation enacted for fiscal years 1986 to 1991 will be contingent upon the administrative determination whether all appropriated funds, when measured against revenues, result in a budget deficit in excess of required target figures." J.A. 46. After a "careful review," J.A. 47, of the Act's main provisions, the court found that "the totality of the Act's standards, definitions, context, and reference to past administrative practice provides an adequate 'intelligible principle' to guide and confine administrative decision-making." J.A. 50. It concluded that "[t]hrough specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function." J.A. 54.

The district court then considered the claim of the plaintiffs and the United States that the Act violates the separation of powers in assigning responsibilities to the Comptroller General,[8] focusing on a section of the Budget and Accounting Act of 1921 which provides that the Comptroller General is removable by a joint resolution of the Congress for specified causes after notice and hearing.[9] The court held that the effect of the Comptroller General's removability on the constitutionality of his

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[8] The district court rejected as "unconvincing" the plaintiffs' assertion that the Act in reality confers final authority on the Directors of OMB and CBO rather than on the Comptroller General. J.A. 55 n.18.

[9] The United States had also contended that the administrative functions under the Deficit Control Act may be delegated only to an officer who is removable at will by the President. For that reason it argued that the Deficit Control Act is unconstitutional because the Comptroller General is insufficiently dependent on the President. The district court decided, however, that "the only [objection] we find it necessary to address" was the claim that administrative powers under the Act "cannot be conferred upon an officer who lacks the degree of independence from Congress that their exercise constitutionally requires." J.A. 55.

powers is ripe even though the Congress has never attempted to remove a Comptroller General. The court reasoned that "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." J.A. 57. Reaching the merits, the court held that the Deficit Control Act assigns the Comptroller General executive functions, J.A. 72–73, and that "congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws." J.A. 75. Rather than invalidate the removal provision, the court concluded that "executive powers . . . cannot constitutionally be exercised by an officer removable by Congress . . . and therefore the automatic deficit reduction process to which [those powers] are central cannot be implemented." J.A. 78. The court declared the President's February 1 sequestration order "without legal force and effect," and it stayed its judgment pending these appeals. J.A. 82.

SUMMARY OF ARGUMENT

1. Congress has determined that the nation's economic well-being requires a standby administrative mechanism to enforce adherence to annual deficit ceilings leading to a balanced budget by 1991. After extensive consideration Congress authorized the Comptroller General to issue the report that underlies the standby presidential sequestration mechanism. The Comptroller General, an appointee of the President under the Appointments Clause, is an Officer of the United States who may exercise "significant governmental duty . . . pursuant to a public law." *Buckley* v. *Valeo*, 424 U.S. 1, 141 (1976) (per curiam). The Budget and Accounting Act of 1921 demonstrates that Congress established the Comptroller General as an Officer of the United States so that it constitutionally could confer administrative duties upon him.

2. The district court focused upon a provision in the Budget and Accounting Act permitting removal of the Comptroller General for specified causes by enactment of

a joint resolution. The history of that Act refutes the court's presumption that the removal provision renders the Comptroller General subservient to Congress. The Congress intended that the Comptroller General serve as an independent officer, under the control of neither Congress nor the Executive branch. It provided the Comptroller General with a statutory mandate of independence by requiring that he perform his statutory duties "without direction from any other officer." J.A. 95. Congress enacted the removal provision not to control the Comptroller General's administrative duties, but to provide him with the greatest possible measure of independence short of Article III judges. The existence of a for-cause removal provision is consistent with the status of an independent officer. *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935).

3. The Court has never adjudicated a dispute over the separation of executive and legislative powers before the use of those powers rendered a decision necessary. This Court's Appointment Clause decisions, *e.g., Buckley* v. *Valeo,* removal decisions, *e.g., Myers* v. *United States,* 272 U.S. 52 (1926), and legislative veto decision, *INS* v. *Chadha,* 462 U.S. 919 (1983), all followed the exercise of the challenged power. The removal provision only establishes procedures by which the Congress could consider a future proposal to enact a joint resolution to remove a Comptroller General. Only the enactment of a joint resolution of removal, which is itself a law, would constitute an exercise of removal authority. If a proposal is ever made to exercise the authority to remove, Congress would need to consider the constitutionality of the removal action in light of this Court's decisions since the Budget and Accounting Act of 1921. The Court should not anticipate how the Congress would resolve that constitutional question by adjudicating the issue "in advance of the necessity of deciding it." *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

4. The history of the Budget and Accounting Act of 1921 and the Deficit Control Act of 1985 shows that Con-

gress both would have created the General Accounting Office in 1921, and would have conferred the duty to report excess deficits upon the Comptroller General in 1985, independently of the removal provision. The provision in 1921 for removal of the Comptroller General by joint resolution was secondary in importance to the need to institute an independent auditing and accounting function outside of the control of the Executive, and may be severed. *Accord INS* v. *Chadha,* 462 U.S. at 931–35 (severing legislative veto authority over suspension of deportations notwithstanding Congress' preference to retain control over delegated authority). Congress' delegation in 1985 of the duty to report excess deficits to the President under the Deficit Control Act did not depend upon the existence of the removal provision, which by then had been dormant for sixty-five years. The removal provision was never mentioned in the legislative history of the Deficit Control Act. The Congress selected the Comptroller General to report final excess deficit estimates precisely because of his longstanding record of independence. This Court should give effect to Congress' judgment that the nation's welfare requires the availability for five years of a standby administrative mechanism to assure deficit reduction.

ARGUMENT

I.

CONGRESS DETERMINED THAT THE PARTICIPATION OF THE COMPTROLLER GENERAL IS NECESSARY TO ACCOMPLISH THE PURPOSES OF THE DEFICIT CONTROL ACT

The Congress decided that the economic well-being of the nation requires three measures: the establishment of decreasing annual deficit ceilings leading to a balanced budget by fiscal year 1991; the revision of congressional procedures to achieve annual budgets within those statutory ceilings; and the creation of a five-year administrative mechanism to enforce adherence to spending limits. Except for the current fiscal year, the administrative

mechanism is a standby procedure that may never be used, but whose availability Congress judged vital to attaining the objectives of the Act. The strong expectation, expressed by a member of the Committee on the Budget, is that "we will reach [the goals of the Act] in a manner far different from what the [standby administrative mechanism] would require simply because the penalties for inaction will be so great, and the demands for a creative and sensitive response will be corrrespondingly great." 131 Cong. Rec. S12574 (Oct. 3, 1985) (Sen. Gorton). As Senator Gramm, a sponsor of the Act, remarked shortly before final passage, "The automatic cuts [of the standby administrative mechanism] are important—they are the disciplining agent—but those automatic cuts after this first year are going to occur only if we fail to do our job." *Id.*, S17389 (Dec. 11, 1985).

The administrative mechanism originated in the Senate, and initially would have charged OMB and CBO with the joint duty of reporting to the President whether the budget was expected to produce a deficit exceeding the ceiling for that fiscal year, and, if so, by what uniform percentage outlays would need to be reduced to comply with the deficit ceiling.[10] During the course of the House debate, constitutional objections were raised to the Senate provision for the participation of CBO in reporting excess deficits to the President jointly with OMB. A letter from Professor Tribe to Representative Synar focused that objection on the Congress' appointment of the Director of CBO. 131 Cong. Rec. H9609 (Nov. 1, 1985) ("[N]o-one who exercises power as an officer of the United States may be appointed by the legislative branch. *Buckley v. Valeo*, . . .").[11] In response, the Senate amended its bill

[10] S. 1702, § 4, 99th Cong., 1st Sess. (1985). The provisions of S. 1702 were adopted as an amendment to H.J. Res. 372, 99th Cong., 1st Sess. (1985), 131 Cong. Rec. S12988 (Oct. 9, 1985).

[11] In spite of this constitutional question, the House passed a bill which stipulated that the deficit and required expenditure reduction estimates would be reported to the President by CBO alone, after CBO

Continued

to designate the Comptroller General, who is appointed by the President, as the officer whose report to the President triggers budget sequestration, and the House accepted this amendment.[12]

In delegating this authority to the Comptroller General, the Congress recognized that officer's longstanding record of independence. The Congress and the President shape budget priorities while enacting appropriations and revenue legislation. They have decided in the Deficit Control Act that if it is necessary to use the Act's administrative mechanism, the mechanism may not "alter the relative priorities in the Federal budget that are established by law." Act, § 252(e); J.A. 134. The selection of the Comptroller General, whose charter requires independence and neutrality, helps to effectuate this fundamental requirement.

The Congress selected the Comptroller General also because of his expertise in handling the government's financial accounts. Congress had previously "delegated to him a number of powers of nonlegislative character primarily to assist it in assuring the financial accountability of the executive agencies." F. Mosher, *The GAO: The Quest for Accountability in American Government* 242 (1979). Realizing that implementation of the Act's administrative mechanism would require the meticulous application of the required expenditure reduction across the government's many accounts, Congress concluded that the Comptroller General's familiarity with the accounts would enable him to perform the task with speed and accuracy.

Finally, and importantly, the Congress sought "to remove any constitutional cloud from this legislation." 131 Cong. Rec. S14911 (Nov. 6, 1985) (Sen. Gramm). The Comptroller General's role "corrected" the "constitutional issue [that] was raised about the involvement of CBO,"

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consulted with OMB. H.J. Res. 372, § 251, 99th Cong., 1st Sess. (1985), 131 Cong. Rec. H9590 (Nov. 1, 1985).

[12] 131 Cong. Rec. S14924 (Nov. 6, 1985); *id.*, H11903-04 (Dec. 11, 1985).

id., S14924, because, in the words of the chairman of the conference on the Act, "GAO—which indeed is an executive agency—has to certify the results of the CBO and the OMB," *id.*, S14659 (Nov. 1, 1985) (Sen. Packwood).[13] At issue in these appeals is Congress' judgment that the Comptroller General is constitutionally qualified to undertake the critical responsibilities that the Act reposes in him.

II.

THE COMPTROLLER GENERAL IS AN INDEPENDENT OFFICER OF THE UNITED STATES, WHO MAY PERFORM THE DUTIES ASSIGNED BY THE DEFICIT CONTROL ACT

A. The President's Appointment of the Comptroller General Renders Him an Officer of the United States

This Court established in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), that the manner of a public official's appointment determines whether he may exercise authority under the laws. The Court invalidated the Federal Election Commission's enforcement functions because four of its commissioners were appointed by Members of Congress. The Court reasoned that unless individuals are appointed by a method prescribed by the Appointments Clause, J.A. 92, they are not "Officers of the United States" under the Clause, and they cannot exercise "significant governmental duty . . . pursuant to a public law." 424 U.S. at 141.

The Comptroller General's appointment comports with the Appointments Clause. "The Comptroller General . . . [is] appointed by the President, by and with the advice and consent of the Senate." 31 U.S.C. 703(a)(1); J.A. 101.

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[13] *Accord id.*, S14666 (Sen. Hollings) ("GAO . . . is an executive body. It can make orders."). These identifications of GAO as an executive agency derive from permanent law. For the purpose of Title 5 of the United States Code, GAO is an "independent establishment," 5 U.S.C. 104, and "an independent establishment" is an "Executive agency," *id.*, 105.

The Court explicitly recognized in *Buckley* that the Comptroller General's appointment renders him an "Officer of the United States." Rejecting the Federal Election Commission's attempt to liken itself to the Comptroller General for precedential support, the Court distinguished the Comptroller General's status by pointing to his "appoint[ment] by the President in conformity with the Appointments Clause." 424 U.S. at 128 n.165. As an "Officer of the United States" the Comptroller General may constitutionally perform his assigned duties pertaining to the "administration and enforcement of the public law." *Id.* at 139.[14]

The legislative history of the Budget and Accounting Act of 1921, J.A. 92–100, demonstrates forcefully that Congress intended the Comptroller General to be an Officer of the United States under the Appointments Clause. Several initial versions of the Act envisioned an office headed by an appointee of the Congress.[15] The House Select Committee on the Budget focused extensively upon the appointment process in two weeks of hearings. The chairman, Representative Good, who was the principal author and floor manager of the Act, summed up the testimony as follows:

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[14] Attorney General Levi described to this Court the relationship between the manner of an officer's appointment and the officer's powers:

> [T]he members of the independent regulatory commissions are "Officers of the United States" within the meaning of Article II, Section 2 of the Constitution. They are appointed by the President and are confirmed by the Senate. *In consequence, they can share, much as cabinet officers share, in the power granted by Article II to execute the laws.*

Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae*, *Buckley v. Valeo*, at 121 n.78 (emphasis added). *Accord Ameron, Inc. v. U.S. Army Corps of Engineers*, 610 F. Supp. 750, 757; 607 F. Supp. 962, 972 (D.N.J. 1985), *appeals argued*, Nos. 85–5226 & 85–5377 (3d Cir. Oct. 29, 1985) (upholding Comptroller General's role in Competition in Contracting Act).

[15] *See, e.g.*, H.R. 551, § 2, 66th Cong., 1st Sess. (1919); H.R. 3738, § 1, 66th Cong., 1st Sess. (1919).

> [E]verybody who has appeared before the committee so far has thought that this position was one of such responsibility and that the officer holding it ought to have such powers that, in order that his functions might be effective, he would have to be an officer of the United States. Of course, if that is the case, [the Appointments Clause] would rather take from us the power to appoint.[16]

Accordingly, the committee rejected the proposals for congressional appointment.[17]

Over the next two years, the Congress grappled repeatedly with the proposed budget legislation before enacting the 1921 Act. Every version of the legislation proposed during this lengthy period of debate provided for the new accounting office to be headed by an Officer of the United States appointed in conformity with the Appointments Clause. Whenever the appointment question arose, Chairman Good reminded his colleagues that, to enable the Comptroller General to perform the functions being assigned, the legislation needed to conform to the mode of appointment prescribed by the Constitution for Officers of

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[16] *National Budget System: Supplement to Hearings Before the House Select Comm. on the Budget*, 66th Cong., 1st Sess. 691 (1919). Distinguished witnesses had told the committee that the President must retain the appointment power in order for the officer to perform the functions contemplated in the legislation. *See, e.g., id.* at 479 (former President Taft); *id.* at 644 (former War Secretary Stimson).

[17] H.R. Rep. No. 362, 66th Cong., 1st Sess. 9 (1919). Chairman Good consistently observed that under the Appointments Clause if the accounting officers were appointed by Congress, they "[c]learly . . . would not be officers of the Government of the United States." *National Budget System Hearings, supra* note 16, at 248; *id.* at 439 ("[I]t seems . . . he must be more than an officer of Congress. If he is to tell some other official of the Government what he can do and what he can not do, he must be an official of the United States.").

the United States.[18] The Congress has never deviated from that understanding.[19]

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[18] *See, e.g.*, 58 Cong. Rec. 7274 (1919) ("In order to make him an official of the United States it is necessary under the Constitution of the United States to place the appointing power in the President."); 59 Cong. Rec. 8611 (1920) (Rep. Good); *id.*, 8612:

> Mr. GOODYKOONTZ. Does not he think that the comptroller general would be rather an agent or a mere arm of Congress . . . and does not come within the category of general officers contemplated to be beyond the jurisdiction of Congress itself?
>
> Mr. GOOD. It was the opinion of the committee that framed the law that the officer we were creating here was an officer of the United States, and his appointment would have to fall under the provisions of Article II of section 2 of the Constitution.

[19] The Congress confirmed that the Comptroller General is an Officer of the United States when it considered legislation in the 1970s to alter the means of the Comptroller's appointment. Recognizing that under *Buckley* his duties require that he be an Officer of the United States, the Congress rejected proposals to permit Congress either to appoint, or to develop a list of proposed nominees from which the President would be required to appoint, the Comptroller General. S. 2206, § 1, 94th Cong., 1st Sess. (1975); H.R. 12171, § 4, 95th Cong., 2d Sess. (1978). The Department of Justice testified that, because the General Accounting Office had a "number of responsibilities . . . that are really executive," the Comptroller General "has to be selected in a way consistent with the appointments clause of the Constitution." *GAO Legislation: Hearings on S. 1878 and S. 1879 Before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 77 (1979).

Congress heeded "the constitutional objections to legislative participation in the appointment process that ha[d] been raised by the executive branch." H.R. Rep. No. 425, 96th Cong., 1st Sess. 14 (1979). The enacted legislation "preserve[d] the President's authority under the Appointments Clause." S. Rep. No. 570, 96th Cong., 2d Sess. 10 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 732, 741, by authorizing Congress only to recommend potential nominees for the President's consideration. General Accounting Office Act of 1980, Pub. L. No. 96-226, § 104(a), 94 Stat. 311, 314-15 (1980) (codified at 31 U.S.C. 703(a)(2)-(3)); J.A. 101.

B. The Comptroller General Performs His Duties Independently and Is Not Subservient to Congress

The district court disregarded the Comptroller General's status as an Officer of the United States and focused instead solely upon a never-used provision which subjects him potentially to removal for specified causes, after notice and hearing, by enactment of a joint resolution, which requires presentation to the President. The court concluded that the bare existence of this removal provision constitutionally disables the Comptroller General from performing the duties assigned to him under the Deficit Control Act because of "the Comptroller General's presumed desire to avoid removal by pleasing Congress." J.A. 57. The court's presumption that the Comptroller General is subservient to Congress is irreconcilable with both the statutory mandate of independence in the Comptroller General's chartering statute and the Comptroller's faithful adherence to that mandate.

1. Congress Provided the Comptroller General With a Statutory Mandate of Independence

The text and legislative history of the 1921 Act which established the General Accounting Office refute the district court's assumption that Congress intended to control the Comptroller General's performance of his administrative duties. That Act transferred to the Comptroller General all statutory duties of the Comptroller of the Treasury and directed that these functions were to be "exercised without direction from any other officer." Budget and Accounting Act, § 304; J.A. 94–95. Among the functions given to the Comptroller General were the duties of settling the government's financial accounts, adjusting claims by and against the government, and prescribing the government's accounting systems and procedures. *Id.*, §§ 305, 309; J.A. 96. Congress charged the General Accounting Office with the task of conducting "an independent audit" of the government's financial accounts, which

Congress viewed as "an essential part of any budget program." [20]

Because Congress believed that the vulnerability of the government's accounting officers to political forces debilitated the existing accounting system,[21] creation of an independent accounting office was a linchpin of the Act. One member of the House committee that initiated the proposal explained that the Comptroller General and his assistant "should be absolutely free and independent of official influences," because "they have very great and far-reaching responsibilities, and they must have a free hand to properly perform their very great duties."[22] Another member explained the committee's expectation "that the comptroller general might not only be brought into conflict with the executive department and with the executive branches of the Government, but sometimes with one side or the other of the aisle in Congress, and possibly both sides, in the impartial discharge of his duties." 58 Cong. Rec. 7282 (1919) (Rep. Bland). To achieve this goal of impartiality Congress made the Comptroller General "an independent officer of the United States who can render a decision according to the law and let the

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[20] S. Rep. No. 524, 66th Cong., 2d Sess. 6 (1920), *reprinted in* 59 Cong. Rec. 6351, 6352 (1920) (reporting predecessor bill).

[21] The chairman of the House committee explained that "one of the troubles with our present system is that the auditors dare not criticize. If they criticize, their political heads will come off." 58 Cong. Rec. 7282 (1919) (Rep. Good).

[22] *Id.*, 129 (Rep. Taylor). The central importance of obtaining an independent audit of government expenditures, free from political constraints and influences, was repeated throughout Congress' consideration of the Act. *See, e.g., id,* 7132 (Rep. Good) ("the comptroller general . . . will have under him a trained corps of auditors, who will owe their position to the fact that they are auditors rather than that they have performed political services"); *id.*, 7199 (Rep. Andrews) ("the accounting system of the Government will never reach its highest degree of efficiency and economy until the accounting offices become an independent organization with the comptroller at its head").

chips fall where they may."[23] The overriding message of the Budget and Accounting Act is Congress' determination that the Comptroller General "exercise the functions of that office independently" and, to ensure that he could do so, that "he should be free and untrammeled from any sort of interference from any source." 61 Cong. Rec. 986 (1921) (Rep. Bankhead).

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[23] 59 Cong. Rec. 8613 (1920) (Rep. Good). The intended independence of the Comptroller General was not undermined by occasional references to him in the debates as "an arm of the Congress. *See, e.g.*, 58 Cong. Rec. 7131 (1919) (Rep. Good). This phrase did not connote subservience to Congress but rather described the Comptroller's additional duties to "investigate . . . all matters relating to the receipt and disbursement of public funds, . . . [to] make such investigations and reports as shall be ordered by either House of Congress or by any committee . . . [and] to furnish [any] committee such aid and information as the committee may request. H.R. 9783, § 13, 66th Cong., 1st Sess. (1919). The Comptroller General was to be "an arm of the Congress" only in the limited sense that "Congress and its committees will at all times be able to consult with officials of this department regarding expenditures and from it will be able to obtain the most reliable information. . . ." 58 Cong. Rec. 7085 (1919) (Rep. Good); *see id.*, 7131 ("[T]here should be on the part of Congress an independent establishment, to whom Congress could go for its information"); *id.*, 7136 (Rep. Hawley) ("he is our officer, in a measure, getting information for us"); *id.*, 7278 (Rep. Byrns) ("He is subject to the will of Congress and every committee in furnishing it information."); 61 Cong. Rec. 982 (1921) (Rep. Good) ("the comptroller general sits there with the Committee on Appropriations as an arm of Congress and can supply the desired information").

The Court has recognized that, even when the GAO is performing these investigative duties, it functions as "an *independent agency* within the legislative branch that exists in large part to serve the needs of Congress." *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 844 (1983) (emphasis added). In that case over GAO's right of access to contractors' records, the Court relied upon the Comptroller General's independence from Congress to conclude that "the fact that two Senators encouraged the GAO to use its lawful authority to the fullest extent possible is irrelevant. . . . [T]he fact that the Comptroller General's request had its origin in the requests of Congressmen or that the GAO reported the data to Congress does not vitiate its authority." *Id.*

2. The Bare Existence of the Never-Used Removal Provision Does Not Render the Comptroller General Subservient to Congress

The law employs a "presumption of regularity . . . that [public officers] have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). "[I]n the absence of clear evidence to the contrary," *id.*, the Comptroller General is entitled to a presumption that since 1921 he has been faithfully performing his duties "without direction from any other officer," Budget and Accounting Act, § 304, J.A. 95.[24] The district court improperly reversed this presumption and, without adducing evidence of any kind beyond the existence since 1921 of that Act's removal provision, substituted its own assumption that the Comptroller General is subservient to Congress. J.A. 57.

The removal provision originated in the House version of the predecessor Budget and Accounting Act which President Wilson had vetoed in 1920. The House bill had provided for the Comptroller General to "hold office during good behavior," rather than for a fixed term of years, "so that these officers are entirely removed from any political influence or effect of changing administrations."[25] Members of the House repeatedly analogized the

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[24] As Justice Frankfurter stated, "It is not to be presumed that for decades officials were either ignorant of the duties with which Congress charged them or derelict in their enforcement." *United States v. American Union Transport, Inc.*, 327 U.S. 437, 459 (1946) (dissenting).

[25] H.R. 9783, § 9, 66th Cong., 1st Sess. (1919); 58 Cong. Rec. 7142 (1919) (Rep. Linthicum). Although the Senate version had limited the Comptroller to a term of five years, *see* S. Rep. No. 524, *supra* note 20, at 13, the conference adopted the House's "good behavior" provision, *see* 59 Cong. Rec. 7944 (1920) (§ 303) (reprinting conference report). After President Wilson's veto of the bill was sustained, *id.*, 8613-14, the House passed the bill again without the removal provision, *id.*, 8657, but the Senate adjourned without acting on the bill.

The next year both Houses passed similar bills. The Senate bill provided the Comptroller General with a term of seven years, and stipulated that his for-cause removal could be undertaken only by joint, rather than concurrent, resolution. S. 1084, § 303, 67th Cong., 1st Sess.

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Comptroller General's office to the judiciary: "We thought that these men, having a judicial status, ought to have a judicial tenure of office." [26] In order to insulate the Comptroller General's "semijudicial" [27] position from becoming "a political football," [28] the House denied the President the power to remove the Comptroller General from office.[29]

As an alternative to presidential removal, the House bill provided for legislative action for removing a Comptroller General who had become "unfit to hold [his] place[ ]." 58 Cong. Rec. 7136 (1919) (Rep. Hawley). From the outset, the House made and adhered to the decision that the tenure of the Comptroller General would be protected by making him removable "only for cause." *Id.*, 7215 (1919) (Rep. Purnell). Critics of the proposal recognized that the removal provision would not permit the Congress to remove the Comptroller General because it disagreed with his policies.[30] Overriding that objection,

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(1921). The House substitute retained the appointment for good behavior and provided for removal by concurrent resolution. H.R. 30, § 303, 67th Cong., 1st Sess. (1921). The conference agreement, which President Harding signed into law, provided the Comptroller General with a term of fifteen years and adopted the Senate's provision on removal by joint resolution. H.R. Conf. Rep. No. 96, 67th Cong., 1st Sess. 5 (1921), *reprinted in* 61 Cong. Rec. 1783, 1784–85 (1921).

[26] 58 Cong. Rec. 7136 (1919) (Rep. Hawley); *accord id.*, 7276 (Rep. Good) ("I feel that this office is to be akin to that of a Federal judge"); 59 Cong. Rec. 8610 (1920) (Rep. Good) ("the committee was guided by a single thought, and that was that these two officers [the Comptroller General and his assistant] should be placed upon a plane somewhat comparable to the position occupied by Federal judges").

[27] H.R. Rep. No. 362, *supra* note 17, at 9.

[28] 58 Cong. Rec. 7277 (1919) (Rep. Madden).

[29] The House defeated an amendment to permit the President to discharge the Comptroller General at will. *Id.*, 7281. Subsequently, the House defeated an amendment to empower the President to remove the Comptroller for specified causes only. 61 Cong. Rec. 1083–84 (1921).

[30] 58 Cong. Rec. 7205–06 (1919) (Rep. Steagall) ("in no event would the [removal] question hinge upon whether or not [the Comptroller General] was cautious or liberal regarding expenditure of money for the public welfare. . . . [W]e see there is nothing in these [for-cause

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the suggestion that Congress should "have the power to remove the official without alleging any cause," *id.*, 7279 (Rep. Black), was turned back, because "it was the idea of the committee in making this recommendation to remove this official as far as we could from politics." [31] Instead the House bill limited removal to specified causes.[32] The ranking member of the House committee emphasized that the House intended the for-cause limitation to be "controlling" because "it can not be changed by future Congresses except by a bill or joint resolution, which would require the approval of the President."[33]

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removal] provisions of the act that would enable the Congress to get rid of a Comptroller General . . . because of a failure to economize."); *accord id.*, 7279.

[31] *Id.* (Rep. Byrns). One member remarked that the removal provision "practically gives the comptroller general the same independence and immunity from partisan political control as is now enjoyed by the employees of the Government in civil service." *Id.*, 7283 (Rep. Briggs). A witness before the House committee testified, "I think the chairman of this committee, by the provision in his bill, that he should hold office unless removed by a vote of the Congress for cause, has in mind practically a tenure during good behavior." *National Budget System Hearings, supra* note 16, at 396 (former House Appropriations Committee Chairman Sherley).

[32] The initial grounds for removal were "inefficiency," "neglect of duty," and "malfeasance in office." Two additional causes, "crime or conduct involving moral turpitude" and "permanent incapacitation," were subsequently added. *Id.*, 7282; 61 Cong. Rec. 1083 (1921). The removal provision as now codified states: "[The Comptroller General] may be removed at any time by— (A) impeachment; or (B) joint resolution of Congress, after notice and an opportunity for a hearing, only for— (i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." J.A. 102. Initially, the bill did not contain an explicit impeachment alternative. H.R. 9783, § 9, 66th Cong., 1st Sess. (1919). The impeachment provision was added to establish explicitly that, as an Officer of the United States, the Comptroller General was understood to be impeachable. 58 Cong. Rec. 7281 (1919).

[33] 58 Cong. Rec. 7279 (Rep. Byrns). The House recognized that it would be "intricate and difficult to remove this officer by the joint action of the two Houses of Congress." *Id.*, 7280 (Rep. Candler). Some members thought that this would be more difficult than the alternative of impeachment. *See, e.g., id.; id.*, 7279 (Rep. Steagall) ("he

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This Court has since established that a for-cause removal provision is consistent with the status of an independent officer, "[f]or it is . . . one who holds his office at the *pleasure* of another, [who] cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor v. United States,* 295 U.S. 602, 629 (1935) (emphasis added). The existence of the for-cause removal provision in the Budget and Accounting Act makes the Comptroller General no more subservient to the Congress than a member of the Federal Reserve Board, who is removable by the President only for cause under 12 U.S.C. 242, is subservient to the President. Indeed, given the statutory requirements for notice and hearing, and the constraints that bicameralism and presentment impose on the enactment of a joint resolution,[34] the independence of the Comptroller General is far more secure than that of Federal Trade commissioners or Federal Reserve Board members.[35] The mere existence of the

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would have a right to be heard, and it would involve a regular trial before both Houses of Congress, and the Lord only knows how long it would take"). Others thought that it would be "a readier and quicker way [than impeachment] of getting rid of an incompetent and inefficient official." *Id.*, 7278 (Rep. Byrns).

[34] Bicameralism and presentment assure that removal "legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials." *INS v. Chadha,* 462 U.S. 919, 949 (1983).

[35] Comptrollers General have shared the Congress' understanding that "[t]he legislative history of the 1921 Act consistently stressed that the Comptroller General should exercise objective and independent judgment, unfettered by political influence from congressional as well as executive branch sources." Comptroller General of the United States, *Annual Report* 1 (1976). Furthermore, they have not viewed the removal provision as inconsistent with, or a threat to, their mandated independence, but to the contrary have stated, "Present requirements for notice and hearings, and removal only by impeachment or for statutorily specified grounds by joint resolution . . . provide the independence vital to achievement of the Comptroller General's statutory mission." *GAO Legislation: Hearing Before the Subcomm. on Reports, Accounting, and Management of the Senate Comm. on Government Operations,* 94th Cong., 1st Sess. 20 (1975) (Comptroller General Staats).

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for-cause removal provision provides no support for the district court's presumption that the Comptroller General is subservient to Congress.

C. Prudential Concerns Preclude the Current Adjudication of the Potential Exercise of the Removal Provision

The restraint with which the Court approaches separation of powers controversies and the respect that the Court shows coordinate branches counsel against adjudicating the potential exercise of the removal provision in these appeals.

1. This Court Has Never Decided Disputes Over the Separation of Legislative and Executive Powers Until the Challenged Power Has Been Exercised

This Court should not resolve in these cases the effect of the removal provision in the Budget and Accounting Act in adherence to its historical "refusal[] to undertake the most important and the most delicate of the Court's functions . . . until necessity compels it. . . ." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569 (1947). The Court has resolved challenges to Congress' exercise of authority to appoint an officer only after "Congress had exercised the claimed power to appoint." *Clark* v. *Valeo*, 559 F.2d 642, 658 (D.C. Cir.) (en banc) (per curiam), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977). *See, e.g., Buckley* v. *Valeo*. The Court has never resolved Congress' authority to limit the President's ability to remove an of-

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Because the Comptroller General has "never accepted the dependent status thrust at [him]," *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962) (plurality opinion), by the district court's presumption that he is subservient to Congress, this Court need do "no more than confer legal recognition upon an independence long exercised in fact," *id.*

Plaintiffs have not disputed that the Comptroller General has performed his reporting duty under the Deficit Control Act entirely independently from Congress. Indeed, the manner in which the Comptroller has performed his reporting duty for this fiscal year has not possibly affected plaintiffs adversely, because Congress' stipulation of the excess deficit amount and sequestration ceiling for this year ensured that "[n]o alternative assumptions which [the Comptroller General] might [have] adopt[ed] would" have changed the amount of the sequester. 51 Fed. Reg. 2814.

ficer before the President had removed an officer and his authority was challenged. *Myers* v. *United States*, 272 U.S. 52 (1926); *Humphrey's Executor* v. *United States*; *Wiener* v. *United States*, 357 U.S. 349 (1958). Similarly, in adjudicating Congress' authority to countermand decisions of executive officers without enacting a law, the Court has waited until one House of Congress had passed a legislative veto and its authority was challenged. *INS* v. *Chadha*, 462 U.S. 919 (1983). In short, in every case in which this Court has adjudicated the separation of executive and legislative powers, the challenged action—whether it be an appointment, a removal, or a legislative veto—had occurred.

Contrasting sharply with this Court's jurisprudence, the district court invalidated the Deficit Control Act, even though in the sixty-five years since the establishment of the GAO, Congress has never attempted to remove the Comptroller General. The court decided to examine the removal provision because it believed that "the Comptroller General's presumed desire to avoid removal by pleasing Congress . . . creates the here-and-now subservience to another branch that raises separation-of-powers problems." J.A. 57. In deciding to examine the unused removal provision to determine the constitutionality of the Deficit Control Act, the district court relied principally on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion). In that case the Court adjudicated a constitutional challenge to the Bankruptcy Act of 1978, which had assigned Article III functions to bankruptcy judges who were appointed to fourteen-year terms, were subject to removal for cause by judicial councils, and whose salaries were subject to diminution. The district court likened "the Comptroller General's presumed desire to avoid removal by pleasing Congress" to "the bankruptcy judge's awareness of the possibility of non-reappointment." J.A. 57.[36]

[36] The district court countered the view that the unused removal provision does not require adjudication by analogizing it to a claim

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The Court's resolution of *Marathon* does not support adjudication of the removal provision in this case. The issue in *Marathon* was whether officers who had been appointed to unquestionably Article I judgeships could perform their assigned duties. The judges' susceptibility to removal was not itself an issue in the case, but was, along with the judges fourteen-year terms and lack of salary protection, among the manifestations of Congress' intent that they be Article I, not Article III, judges. Because the Article I status of the offices was manifest regardless of the removal provision, the Court's decision to resolve the question over the constitutionality of the offices was not grounded in the existence of the removal provision. Therefore, the lack of use of the removal provision was not an issue in the Court's resolving the compatibility between the judges' Article I status and their duties. In con-

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"that a tenure statute providing for removal of a judge exercising Article III powers by joint resolution could similarly not be challenged, a prospect we are not prepared to entertain." J.A. 59. In fact, one appellate court has refused to adjudicate the claim that a statute facially interferes with the independence constitutionally guaranteed Article III judges, even when the claim was made by a judge himself. *See Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1100–1103 (D.C. Cir. 1985), *petition for cert. filed*, No. 85–1301 (Jan. 30, 1986) (dismissing as premature challenge to Judicial Councils Reform and Judicial Conduct and Discipline Act of 1980). In a related controversy, another court sustained the constitutionality of several facially valid sanctions provided by the Act, but declined to adjudicate, in advance of their use, whether other potential sanctions unconstitutionally infringe on judicial independence. *In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, Nos. 85–2054 & 85–5420, slip. op. at 35–56 (11th Cir. Feb. 20, 1986).

If the district court correctly interpreted *Marathon* as permitting adjudication of the unused removal provision in the Budget and Accounting Act, then every litigant before an Article III judge is equally entitled to an adjudication of the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, because, in the court's logic, "it is [the judge's] presumed desire to avoid [discipline] by pleasing [the judicial council] which creates the here-and-now subservience . . . that raises separation-of-powers problems." J.A. 57.

trast here, the district court's challenge to the Comptroller's ability to perform his assigned duties rested solely upon the existence by itself of the unused removal provision. Thus, unlike *Marathon* the constitutional question presented here is based solely on the existence of a power that has never been exercised. *Marathon* provides no basis for abandoning the Court's consistent practice of deciding questions over the removal power only after an officer has been removed.[37]

Based on its misunderstanding of *Marathon* the district court established an unprecedented right for individuals to challenge under the Appointments Clause potential infringements between the branches that have not occurred and may never occur.[38] The court's premature adjudica-

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[37] Another reason why *Marathon* does not support the adjudication of the removal provision here is that the cases derive from different constitutional provisions, which provide different guarantees. In *Marathon* the Court tested the bankruptcy judges' authority against the "good Behavior" Clause, art. III, § 1, which guarantees that officers who exercise a particular type of authority—Article III power—will not be subject to "[p]eriodical appointments, however regulated, or by whomsoever made." A. Hamilton, *The Federalist Papers No. 78*, at 495 (B. Wright ed. 1961). Unlike the Appointments Clause, the "good Behavior" Clause was designed not only "to maintain the checks and balances of the constitutional structure, [but] also to guarantee that the process of adjudication itself remained impartial." *Marathon*, 458 U.S. at 58. To fulfill that guarantee the Court permits litigants to challenge exercises of judicial authority under the "good Behavior" Clause. *See, e.g., Thomas v. Union Carbide Agricultural Products Co.*, 105 S.Ct. 3325, 3332 (1985); *Palmore v. United States*, 411 U.S. 389 (1973); *Glidden Co. v. Zdanok*.

[38] Both opponents and supporters of the removal provision have long recognized that "the only manner in which this question could be presented for judicial examination would be by removal of the Comptroller General. This has never been done and therefore no opportunity has ever been offered to test the validity of the removal provision." *Constitutionality of the General Accounting Office: A Monograph Submitted to the House Select Comm. on Government Organization*, 75th Cong., 3d Sess. 2 (Comm. Print 1938); *accord* 59 Cong. Rec. 8611 (1920) (Rep. Good and Rep. Bland); H. Mansfield, *The Comptroller General: A Study in the Law and Practice of Financial Administration* 75 (1939) ("to secure a judicial settlement of the removal power there must be a removal").

tion of the dormant removal provision violates the policy of restraint through which this Court has "astutely avoided adjudication of the power of control as between Congress and the Executive of those serving in the Executive branch of the Government 'until it should be inevitably presented.'" *United States v. Lovett*, 328 U.S. 303, 328 (1946) (Frankfurter, J., concurring) (quoting *Myers*, 272 U.S. at 173).[39]

2. The Court Should Not Anticipate Congress' Use of the Removal Provision

The challenged statutory provision creates procedures to guide the consideration by future Congresses of a joint resolution to remove the Comptroller General. Only the actual enactment of such a future joint resolution, which would itself be a statute, and not the present procedures, could cause the Comptroller General's removal and constitute an exercise of Congress' authority. Because the district court incorrectly assumed that the Comptroller General is subservient to Congress, it unnecessarily anticipated how the Congress, which as a coordinate branch of government shares responsibility for assessing the constitutionality of its actions, would consider any future

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[39] The Court's adjudication of *Lovett* demonstrates the soundness of this principle of restraint. *Lovett* presented the question of Congress' power, under the bill of attainder clause, to enact an appropriations statute forbidding the disbursement of funds to pay salaries of specified government employees. The Court based its invalidation of the statute upon its "interpretation of the meaning and purpose of the section, which in turn requires an understanding of the circumstances leading to its passage." 328 U.S. at 307. The Court's reliance upon Congress' purpose in removing the employees in *Lovett* demonstrates the current prematurity of an adjudication of this removal provision, whose lack of use would require a resolution "on the basis of imaginary and non-existent facts." *Id.* at 329 (Frankfurter, J., concurring). By deciding the case on bill of attainder grounds, the Court avoided adjudication of the Executive branch's broader claim that the statute infringed on the Executive's removal power. *See* Ely, United States v. Lovett: *Litigating the Separation of Powers*, 10 Harv. C.R.-C.L. L. Rev. 1, 30 (1975).

proposal to use the dormant, sixty-five-year-old removal provision.[40]

Congress enacted the removal provision in the 1921 Budget and Accounting Act only after careful deliberation to determine that such a provision was consistent with the constitutional status of an independent office.[41] Since then, this Court's subsequent decisions in *Myers v. United States* and *Humphrey's Executor v. United States* have shed additional light on the constitutional issues, which could affect judgments concerning the correctness of the Congress' determination.[42] The Congress merits

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[40] The district court analogized Congress' "formal assertion (by legislation) of the power" to remove the Comptroller General to an administrative agency's "formal assertion (by rule) of the power to [punish conduct]. *Cf. Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)." J.A. 58. The court's reliance upon *Abbott Laboratories*, in which the Court permitted pre-enforcement review of agency regulations, slights the gravity of the judicial function of declaring an Act of Congress unconstitutional and the deference owed a coordinate branch. *Abbott Laboratories* presented an Administrative Procedure Act claim that regulations violated the agency's statutory authority. There was no constitutional claim, let alone an attempt to declare a statute unconstitutional. The Court's balancing between the fitness of issues for review and the hardship of withholding adjudication in such a context, 387 U.S. at 149, offers little guidance for adjudicating the constitutional status of the Comptroller General.

Moreover, the challenge in *Abbott Laboratories* was to freshly adopted regulations whose impact upon the litigants was "direct and immediate." *Id.* at 152. The analogy between new regulations that pose a dilemma between complying at great cost or facing potential criminal penalties, *id.*, and this sixty-five-year-old provision, which has never been used, is far-fetched. A closer source of learning is this Court's refusal to adjudicate constitutional challenges to criminal "provisions that have during so many years gone uniformly and without exception unenforced." *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion).

[41] *See, e.g.*, 59 Cong. Rec. 8610–13 (1920); 60 Cong. Rec. 339–41 (1920); 61 Cong. Rec. 982–84, 989–92 (1921).

[42] Additionally, this Court's decision in *United States v. Lovett* would be relevant to the Congress' consideration of any proposal to remove a Comptroller General, because the statute invalidated in that case was "designed to force the employing agencies to discharge respondents. . . ." 328 U.S. at 314.

the presumption that if it ever were to consider using the removal provision, it would, in execution of its Members' oaths to uphold the Constitution,[43] conscientiously examine the constitutionality of the proposed action in light of the Court's decisions subsequent to the 1921 Act.[44]

The district court's adjudication of the removal provision, anticipating the outcome of debates that will never occur unless a proposal is made that the Congress employ the provision, cannot be reconciled with the Court's obligation to avoid resolving "a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

D. The Removal Provision Should Be Severed If It Is Inconsistent With the Comptroller General's Duties Under the Deficit Control Act

If the existence of the removal provision in the 1921 Act is incompatible with the Comptroller General's functions under the 1985 Act, then either the removal provision or the functions must be invalidated. This determi-

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[43] "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Rostker v. Goldberg,* 453 U.S. 57, 64 (1981).

[44] This Court has previously relied upon Congress' "great debate" in 1789 on the constitutional removal question. *Myers,* 272 U.S. at 121, 111-36. At other critical junctures of American political history, the Congress has conducted similarly sustained and scholarly debate on the constitutional question. *See, e.g.,* 10 Cong. Deb. 834-36, 1318-39, 1498-1519, 1573-78, 1628-30, 1679-89 (1834) (debate led by Senators Webster and Clay over President Jackson's removal of Treasury Secretary Duane for refusal to withdraw government deposits from United States Bank); Supp. to Cong. Globe, 40th Cong., 2d Sess. 32-34, 125-30, 255-64, 273-76, 315-16, 327-31, 353-56 (1868) (impeachment trial of President Andrew Johnson for removal of War Secretary Stanton).

The court's analogy to the justiciability of a hypothetical "statute providing for removal of a judge exercising Article III powers by joint resolution," J.A. 59, impugns the Congress' performance of its constitutional responsibility. The removal provision in the Budget and Accounting Act was not a gauntlet thrown down by Congress to challenge the decisions of this Court or the independence of coordinate branches. It was the product of Congress' conscientious deliberations regarding the requirements of the Appointments Clause as informed by this Court's decisions at the time.

nation is a severability question, which is "largely a question of legislative intent." *Regan v. Time, Inc.*, 104 S.Ct. 3262, 3269 (1984) (plurality opinion). Congress' intent from the establishment of the GAO in 1921 through the enactment of the Deficit Control Act favors the preservation of the Comptroller's functions.

1. The Severance Choice Between the Removal Provision and the Deficit Control Act Is Governed by Legislative Intent

Plaintiffs allege that they have been injured by the delegation of particular duties to "an official[ ] of the legislative branch." J.A. 10, 14. Regardless of which were severed—the removal provision, which the district court presumed renders the Comptroller General subservient to Congress, or the Deficit Control Act, which assigns duties to him—the alleged wrong would be cured: no impermissible functions would be performed by an official under legislative control.

A similar choice between constitutionally incompatible provisions is posed in equal protection challenges to benefit programs. When a statute is constitutionally underinclusive, "there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J. concurring). The Court sees this as a severability question in which it "should not . . . 'use its remedial powers to circumvent the intent of the legislature.' " *Heckler v. Mathews*, 104 S.Ct. 1387, 1394 n.5 (1984) (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring and dissenting)). Similarly, the Court's determination whether the removal provision or the Comptroller General's functions under the Deficit Control Act should be severed to remedy a constitutional conflict must be governed by congressional intent.

The district court eschewed reliance upon legislative intent to choose between the two statutes because it viewed the Deficit Control Act as the statute that caused the injury which conferred standing upon the plaintiffs.[45] However, the plaintiffs are not entitled to nullify the sequestration that reduced their funds any more than the victim of a constitutionally underinclusive statute is entitled to receive "any particular amount of benefits." *Heckler v. Mathews*, 104 S.Ct. at 1394. Neither litigant's "standing . . . depend[s] on his ability to obtain increased . . . payments," *id.*, because "when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class," *id.* at 1395 (quoting *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931)) (emphasis omitted). Similarly, the plaintiffs have no legally cognizable interest in which of the two provisions in these appeals is invalidated, the removal provision or the delegation of administrative responsibilities under the Deficit Control Act. Their standing under the separation of powers exists only to redress the injury resulting from the allegation that the two provisions are "constitutionally imcompatible." J.A. 61. As long as any incompatibility that ag-

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[45] J.A. 59. The cases cited by the district court, J.A. 59-60, did not present a severability issue. In *Marathon*, *Buckley v. Valeo*, and *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928), litigants challenged officers' exercise of authority by alleging that their appointments did not conform to constitutional requirements. Invalidating the officers' authority was necessary to provide each challenger with relief, because no severance of the offending conditions of the officers' appointments could have remedied the constitutional defect. Because courts are not permitted to rewrite statutes, *United States v. Reese*, 92 U.S. 214, 221 (1875); *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968), the Court was not free to alter the constitutional status of the offices by, for example, transferring the appointment authority of the Federal Election commissioners to the President in *Buckley*, or converting the bankruptcy judges to Article III judges with lifetime tenure in *Marathon*.

grieves plaintiffs is remedied, they will have obtained all of the relief to which they are entitled.[46]

This Court's decisions refute any contention that it is significant that the removal provision and the authority challenged by the plaintiffs are in separate statutes. When the Court resolves challenges to an officer's authority, it necessarily reviews the organic statute that chartered the office as well as the statute that conferred the challenged authority. In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (plurality opinion), the Court sustained statutes assigning to the judges of the Court of Claims and the Court of Customs Appeals the additional duty of serving on other Article III courts. The challengers had argued that the two courts were not Article III courts and that their judges could not constitutionally be assigned the additional duty to sit on Article III courts. They had based their challenge on the existence of other statutes conferring upon the two courts jurisdiction allegedly incompatible with the exercise of judicial power. 370 U.S. at 579–82. The parallel to the present appeals is that the plaintiffs are similarly challenging the assignment of new duties to

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[46] Permitting a litigant to select which provision to invalidate would lead to the arbitrary result that whichever of two incompatible provisions is first challenged is invalidated while the other provision remains on the books. The district court's approach suggests, for example, that any individual aggrieved by an action of the Tennessee Valley Authority could obtain an invalidation of TVA's plainly executive power-generating and development authority, because an unused but extant statute purports to authorize removal of TVA board members by *concurrent* resolution of the Congress, 16 U.S.C. 831c, which would arguably render them more responsive to Congress than the joint resolution which covers the Comptroller General. There is no support in the law for this arbitrary outcome.

It is irrelevant that plaintiffs' complaints prayed for invalidation of the Deficit Control Act, not the removal provision in the Budget and Accounting Act. In declaratory judgment actions as in others, it is "the court's duty to grant the relief to which the prevailing party is entitled, whether it has been demanded or not. . . . The question is not whether plaintiff has asked for the proper remedy but whether he is entitled to any remedy." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d*, § 2664, at 146, 153–54 (1983).

an office, and are basing their challenge on an alleged defect in the original structure of the office. However, this Court in *Glidden* rejected the attempt to invalidate the subsequent assignment statutes on the basis of potential defects in early jurisdictional statutes. The Court dismissed the contention that the "independence of either [court] has been so compromised by its investiture with [this questionable] jurisdiction . . . as to destroy its eligibility for recognition as an Article III court." *Id.* at 582. Assuming "that [the jurisdiction] cannot be entertained by an Article III court," the Court held, "[i]t does not follow . . . that . . . the [courts] must relinquish entitlement to recognition as an Article III court." *Id.* Instead, the Court preserved the courts' Article III status and their new statutory duties, and held that "if necessary, the particular offensive jurisdiction . . . would fall." *Id.* at 583.[47] Analogously, any constitutional incompatibility between the Comptroller General's removal provision and his authority under the Deficit Control Act does not necessarily render his functions under the Deficit Control Act invalid. Instead, as in *Glidden*, the Court must examine Congress' intent to determine which provision to sever.

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[47] Similarly, in *Ex Parte Bakelite Corporation*, 279 U.S. 438 (1929), the Court resolved a challenge to the constitutionality of a statute that permitted the Court of Customs Appeals to hear appeals from decisions of the Tariff Commission that were reviewable by the President. The challenger's argument was the mirror image of *Glidden*: it maintained that the court was an Article III court that could not exercise the non-Article III jurisdiction conferred upon it by statute. The challenger argued that a statute authorizing other Article III judges to sit upon the court demonstrated that the court was an Article III court, because otherwise Article III judges could not constitutionally sit on it. As in *Glidden* the Court rejected the contention that the constitutional incompatibility between the two statutes required invalidation of the court's exercise of non-Article III functions, because "if there be constitutional obstacles to assigning judges of constitutional courts to legislative courts, the provision cited is for that reason invalid. . . . " 279 U.S. at 460.

2. Preserving the Comptroller General's Duties Under the Deficit Control Act and Severing the Removal Provision in the Budget and Accounting Act Conforms Most Closely to the Intent of Congress

The severability question is whether " 'the Legislature would . . . have enacted those provisions which are within its power, independently of that which is not. . . .' " *Buckley*, 424 U.S. at 108 (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)). Two questions must be asked: (1) whether Congress would have assigned administrative duties to the Comptroller in 1921, independently of the removal provision, and (2) whether Congress would have assigned additional functions to the Comptroller under the Deficit Control Act in 1985, independently of the removal provision. To answer these questions, it is necessary to examine Congress' intent in enacting each law.

a. Congress' creation of the General Accounting Office did not depend upon the removal provision

Congress' primary purpose in establishing the General Accounting Office was to enhance the accountability of the government's financial systems by placing auditing and accounting functions under the control of an independent officer. H.R. Rep. No. 14, 67th Cong., 1st Sess. 7, 8 (1921). Congress transferred to the Comptroller General functions that had previously been the responsibility of Executive officials, because, "inasmuch as [these executive officials] owe their appointment to the President, they could not hope to hold their positions if they criticized wastefulness or extravagance or inefficiency in any of the departments." *Id.* at 7. Congress specifically assigned the Comptroller General the duty to settle claims by or against the United States, to adjust government accounts, and to prescribe accounting systems for the government. Budget and Accounting Act, §§ 304-305, 309; J.A. 94-96. The Act transferred to the Comptroller the authority to disallow payments and finally settle ac-

counts so that he "could exercise it independently of either the executive or legislative branches." F. Mosher, *supra* page 13, at 50.

The importance of the mechanism for the Comptroller General's removal was secondary to the need for an independent auditing and accounting process outside of the control of the Executive.[48] Although the legislative history expresses Congress' preference for a legislative removal provision, it also demonstrates that Congress was willing to forgo it if necessary to obtain the transfer of the auditing and account settlement functions from the Treasury Department to an officer independent of the Executive. After President Wilson's veto of the predecessor bill to the Budget and Accounting Act, the severability question was raised explicitly in the House. Representative Pell inquired, "If we pass this over the President's veto and then the Supreme Court should uphold the contention of the President, this bill would not fail, would it? The bill would continue." 59 Cong. Rec. 8611 (1920). The response was, "Certainly." *Id.* (Rep. Blanton).[49] Furthermore, both Houses of Congress passed bills containing no provision for legislative removal at all at different times

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[48] To enable the Comptroller General to perform these functions independently, Congress established the General Accounting Office "independent of the executive departments," *id.*, § 301; J.A. 93, and directed the Comptroller to exercise his functions "without direction from any other officer," *id.*, § 304; J.A. 95. To enhance the Comptroller's independence, the Act prohibited the President from removing him. *Id.*, § 303; J.A. 94. *See* pages 21-22 *supra*.

[49] Representative Good had not considered the question, which he thought was "very remote" and could be raised only after a Comptroller General had been removed. *Id.* President Wilson's veto message reveals that the Executive shared Congress' understanding that the elimination of the removal provision would be preferable to the evisceration of the Comptroller General's duties. President Wilson vetoed the bill because he believed "that the vesting of this power of removal in the Congress is unconstitutional. . . ." H.R. Doc. No. 805, 66th Cong., 2d Sess. 2 (1920). Wilson did not maintain that the Comptroller General's administrative functions were unconstitutional because of the removal provision, but that the removal provision was unconstitutional.

during the consideration of the Act.[50] Had Congress been forced to choose, the evidence demonstrates that it would have created the General Accounting Office to perform accounting functions independently of the Executive, with no legislative means of removal.

In *INS v. Chadha* the Court severed the means by which Congress had retained control of the Attorney General's exercise of authority to suspend deportations of aliens from the grant of the authority, notwithstanding Congress' demonstrated "reluctan[ce] to delegate final authority over cancellation of deportations." 462 U.S. at 932. Although the Congress which enacted the Budget and Accounting Act preferred to provide for the removal of the Comptroller General by joint resolution, its establishment of the GAO and transfer of duties to the Comptroller General was in no way dependent upon the removal provision. If necessary, the removal provision should be severed because "the policies Congress sought to advance by enacting [the 1921 Act] can be effectuated even though [the removal provision] is unenforceable." *Regan v. Time, Inc.*, 104 S.Ct. at 3269.

The district court's assumption that Congress would have stripped the Comptroller General of his administra-

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[50] Initially, the removal provision was adopted at the instance of the House, which included it in its 1919 bill. H.R. 9783, § 9, 66th Cong., 1st Sess. (1919). The Senate struck the provision and reported an amendment with no mechanism for removal by resolution, but permitting the President to remove the Comptroller General for cause only. *Id.*, § 21. President Wilson's veto followed the conference's adoption of the House version. After the veto was sustained, the House passed the Act again, without any removal provision. 59 Cong. Rec. 8657 (1920). The Senate adjourned without acting on the bill.

The conclusion that Congress did not view removal authority as essential to the Act is also demonstrated by Representative Good's reliance on a Library of Congress memorandum analyzing the constitutional issues raised by President Wilson's veto. The memorandum maintained that the removal provision was constitutional, but concluded that if Congress were to choose between permitting the Comptroller General to be removed by the President or sacrificing the power of removal, "on the whole . . . this officer would be more effective if he could be removed only by impeachment. . . ." 60 Cong. Rec. 341 (1920).

tive functions rather than sacrifice the removal power is inconsistent with "[t]he cardinal principle of statutory construction[, which] is to save and not to destroy." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Severing the Comptroller General's administrative functions would defeat Congress' basic intention in the Budget and Accounting Act to obtain independent governmental audits and accounting. It would imply that Congress would have preferred that there be no independent auditing and accounting capability at all unless it could retain the right to remove the officer charged with these tasks. There is no support in the legislative history for the anomalous suggestion that Congress would have risked entirely destroying the government's accounting procedures in enacting legislation intended to strengthen the accounting system by placing it under the control of an independent officer.[51] The Court should adhere to Congress' dominant purpose in creating the General Accounting Office.[52]

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[51] This Court's decision in *Glidden* demonstrates that examination of the balance of functions conferred upon an officer is essential to determine whether the officer's functions should be invalidated to remedy a constitutional problem in the office. 370 U.S. at 583 (rejecting attempt "to make the status of these courts turn upon so minuscule a portion of their purported functions").

[52] The conclusion that Congress viewed the establishment of an independent officer to perform auditing and accounting as more important than reserving the power to remove that officer is reflected in Congress' subsequent consideration of proposals to alter the GAO. Since 1921 Congress has rejected proposed legislation to divide the administrative functions of the Comptroller General from the investigative functions. These bills, initiated by the Executive, would have returned the Comptroller General's accounting functions to the full control of the Executive branch while retaining an officer, removable by the Congress, to perform solely investigative tasks for Congress. *See, e.g.*, S. Rep. No. 1236, Pt. 2, 75th Cong., 3d Sess. 28, 37-40 (1938) (reprinting bill drafted by President's Committee on Administrative Management); S. 2970, §§ 301-306, 75th Cong., 1st Sess. (1937); S. 3331, §§ 301-306, 75th Cong., 3d Sess. (1938). In lieu of these proposals, which would have effectively severed the Budget and Accounting Act along the lines of the district court's decision, the Congress enacted

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b. Congress' selection of the Comptroller General to report excess deficits did not depend upon the removal provision and should be preserved

Congress' assignment of reporting duties to the Comptroller General in the Deficit Control Act was not dependent upon the viability of the legislative removal provision in the Budget and Accounting Act. To the contrary, the reason that Congress ultimately conferred the duty to report excess deficits upon the Comptroller General was precisely because Congress knew that he was politically independent of both the President and the Congress. The initial version of the Deficit Control Act had given the Directors of the OMB and CBO the shared duty of reporting excess deficits to the President. *See* pages 12–13 *supra*. After concerns were raised about the constitutionality of the role given CBO, the Congress determined to limit both it and OMB to an advisory role. The final duty to report excess deficits was given instead to the Comptroller General because he is a trusted, neutral official who has expertise in the government's financial accounts as well as political independence from both Congress and the Executive.

The decision to assign this reporting duty to the Comptroller General answered the need of congressional critics of the Act for "a wall to be created that takes these [administrative] decisions out of the hands of the President *and the Congress,* . . ." 131 Cong. Rec. H9846 (Nov. 6, 1985) (Rep. Gephardt) (emphasis added). There is no evidence anywhere in the legislative history of the Deficit Control Act suggesting that Congress viewed the removal provision as relevant, let alone instrumental, to its decision to vest the reporting authority in the Comptroller

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the Reorganization Act of 1939, which preserved the Comptroller General's dual mission and prohibited the President from transferring or abolishing any of his functions. Pub. L. No. 19, § 3(b), ch. 36, 53 Stat. 561 (1939). Congress' action militates strongly against severing the 1921 Act by divesting the Comptroller General of his administrative duties.

General.[53] There is no reason to doubt that Congress would have given the Comptroller General the duty to report excess deficits regardless of the removal provision.

The conclusion that the removal provision should be severed if necessary to preserve the Comptroller General's functions under the Deficit Control Act is not altered by Congress' enactment of an alternative "fallback" procedure "[i]n the event that any of the reporting procedures [in the trigger mechanism] are invalidated." Act, § 274(f); J.A. 165. Under the fallback procedure a special joint congressional committee forms to receive the deficit estimates of OMB and CBO. Then, in place of the administrative mechanism, the fallback provides for the committee to report to the Congress a joint resolution whose enactment would require the President to sequester the funds necessary to eliminate the excess deficit.

The district court relied upon the fallback provision to sever the reporting mechanism because "setting aside the grant of powers to the Comptroller General would result in a state of affairs that Congress unquestionably was willing to accept." J.A. 61.[54] The court's presumption

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[53] The district court "doubt[ed] that the automatic deficit reduction process would have passed without . . . protection [against what the House conceived to be the pro-executive bias of the OMB], and doubt[ed] that the protection would have been considered present if the Comptroller General were not removable by Congress itself." J.A. 60. Although it is indisputable that Congress demanded that the reporting function be performed by an official independent of the Executive's budget policy apparatus, which OMB is not, there is no support in the legislative history for the district court's assumption that Congress intended also to retain control over the official performing the estimating duty.

[54] Strictly, the existence of the fallback procedure is not relevant to the Court's severability determination, because Congress provided for the fallback to take effect only after an invalidation of the reporting mechanism. Determining whether to invalidate the mechanism requires a prior decision whether the reporting duties or the removal provision should be severed. Congress' stipulation that the fallback should be used once the reporting mechanism is severed is not probative of whether Congress would have enacted the reporting mechanism without the removal provision. The attempt to extract Congress'

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that the Congress was "willing to accept" the fallback mechanism is overwhelmingly rebutted by the legislative history of the Deficit Control Act. From the day that the Deficit Control Act was first introduced, Congress universally understood that "[t]he most important feature of our proposal . . . is its creation of a mechanism which will automatically institute the budget cuts necessary to achieve the prescribed deficit targets." 131 Cong. Rec. S12084 (Sept. 25, 1985) (Sen. Rudman).[55]

Throughout its deliberations Congress identified the automatic trigger as the critical ingredient in the Deficit Control Act because it was "the disciplining agent," *id.*, S17389 (Dec. 11, 1985) (Sen. Gramm), "the sword of Damocles," *id.*, S17400 (Sen. Gorton), which would lead to "a more responsible budget," *id.*, S17401. Congress had mandated a balanced budget by law before,[56] but the "budget process ha[d] failed because it d[id] not have enough teeth in it," 131 Cong. Rec. S12647 (Oct. 4, 1985) (Sen. Boren). The enactment of the Deficit Control Act reflects Congress' judgment that "[w]e have got to have a trigger," *id.*, H9611 (Nov. 1, 1985) (Rep. Lott), so that "[f]or the first

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intent from the enactment of the fallback transforms legislation that was intended only to address a possible contingency into legislation that causes the contingency to occur. In order to avoid making Congess' enactment of a contingent fallback procedure a self-fulfilling prophecy, the severability decision must be made strictly on the basis of independent evidence of Congress' intent in enacting the reporting mechanism without regard to the fallback.

[55] The Executive branch has appreciated that the pivotal contribution of the Deficit Control Act to deficit reduction is its administrative mechanism: "The essence of [the Act] is that it provides an assurance that the deficit will decline. Previous efforts to set targets for the deficit lacked such an assurance because there were no procedures for enforcing the deficit targets." Office of Management and Budget, *Budget of the United States Government: Fiscal Year 1987*, H.R. Doc. No. 143, 99th Cong., 2d Sess. 2-15 (1986).

[56] *See, e.g.*, Pub. L. No. 96-389, §3, 94 Stat. 1551, 1553 (1980); Pub. L. No. 95-435, §7, 92 Stat. 1051, 1053 (1978) (codified at 31 U.S.C. 1103); *see also* Budget and Accounting Act of 1921, §202(a), Pub. L. No. 13, ch. 18, 42 Stat. 21 (codified at 31 U.S.C. 1105(c)) (requiring President to recommend action to balance budget).

time, the consequences of doing nothing will be worse than the consequences of doing something," *id.*, S17401 (Dec. 11, 1985) (Sen. Gorton).

"In exercising its power to review the constitutionality of a legislative act, a federal court should act cautiously [, because a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 104 S.Ct. at 3269. The Court should respect Congress' judgment that an administrative mechanism is essential to balancing the budget. The paramount national importance of the Act's administrative mechanism, compared to the far less significant role of the removal provision in the chartering of the Comptroller General's office, requires that any incompatibility between them be resolved by preserving the mechanism in the Act, along with the Comptroller General's other administrative duties over the past two-thirds of this century.

CONCLUSION

The declaratory order of the district court should be reversed.

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